

JUL 5 1979

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1978

No. 78-1820

ASSOCIATED THIRD CLASS MAIL USERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Intervenor-respondent, National
Association of Letter Carriers, AFL-CIO,
(herein "NALC")* submits this brief in

*The District Court granted NALC's motion to intervene in this case by order, dated January 5, 1977. NALC appeared in proceedings before both the District Court and Court of Appeals. NALC is the exclusive collective bargaining representative for all nonsupervisory Postal Service employees in the city letter carrier craft.

opposition to the petition filed by Associated Third Class Mail Users for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set forth at pages 1a-14a of the petition. The Memorandum Opinion of the District Court is reported at 440 F.Supp. 1211 and is set forth at pages 18a-26a of the petition.

QUESTIONS PRESENTED

1. Whether the Courts below erred in ruling that the United States Postal Service has reasonably interpreted its statutory monopoly over the conveyance of "letters" so as to include paper advertisements directed to specific persons or to specific addresses?

2. Whether the Courts below erred in ruling that the application of the statutory postal monopoly to the conveyance of specifically addressed paper advertisements does not render the Private Express Statutes, or regulations promulgated thereunder, void under the First and Fifth Amendments to the United States Constitution?

STATEMENT OF THE CASE

The so-called Private Express Statutes, presently codified at 39 U.S.C. §§601-606 and 18 U.S.C. §§1693-1699, 1725, grant to the United States Postal Service the exclusive right to carry "letters" for others. Pursuant to its rule-making authority under 39 U.S.C. §401(2), the Postal Service has promulgated regulations interpreting the scope of its monopoly. 39 C.F.R. §310.1 et seq. The regulations define a "letter" subject to the monopoly

as "a message directed to a specific person or address and recorded in or on a tangible object", 39 C.F.R. §310.1(a)* and further specify that "identical messages directed to more than one specific person or address...constitute separate letters", 39 C.F.R. §310.1(a)(6). This definition includes printed advertising material which is specifically addressed to persons and/or locations.

Petitioner, Associated Third Class Mail Users (herein "petitioner" or "ATCMU") is a trade association consisting of various organizations which "distribute through the mails substantial numbers of paper items for advertising and merchan-

*39 C.F.R. §310.1(a)(3) provides that "a message is directed to 'a specific person or address' when, for example, it is directed to a named or identified individual, organization, or official, or when it is directed to a specific place."

dising purposes" (Complaint ¶1). Under the statutory and regulatory scheme described above, ATCMU's members are free to utilize at least four means of distributing their advertising materials. First, the paper advertisements may be sent through the Postal Service as third class mail. Second, ATCMU members may utilize alternative distribution systems whenever their material is not specifically addressed. Third, specifically addressed advertising material may be conveyed by private deliverers provided that, pursuant to 39 U.S.C. §§601, the materials display proper postage cancelled in ink. Finally, ATCMU members may invoke the special exception provided by the regulations for "newspapers and periodicals" so as to arrange delivery through insertion of their material into a newspaper or periodical. 39 C.F.R. §310.1(a)(7)(iv).

On September 21, 1976, petitioner filed its complaint herein, seeking

declaratory and injunctive relief invalidating the foregoing regulations in their entirety, or as applied to specifically addressed advertisements. Significantly, the complaint does not allege that the Postal Service's regulatory scheme prevents ATCMU members from distributing paper advertisements. Petitioner's sole claimed injury is that the regulations prohibit utilization of allegedly less expensive alternative methods of delivery.

There being no dispute over material facts, the District Court granted summary judgment to the Postal Service and NALC in a memorandum and order, dated November 29, 1977. Judge Parker ruled that (1) specifically addressed paper advertisements are "letters" within the Private Express Statutes, and that (2) the application of the postal monopoly to such advertisements did not render the statutes

or regulations unconstitutional. The Court of Appeals affirmed both rulings in a decision dated March 9, 1979. On April 3, 1979, the Court denied ATCMU's petition for rehearing.

REASONS FOR DENYING
THE WRIT

I. The Court of Appeals' Construction
of the Private Express Statutes is
Clearly Correct

In rejecting petitioner's statutory claim, the Court below held that the Private Express Statutes permit the Postal Service to treat specifically addressed advertising circulars as "letters" within the postal monopoly. The Court based its decision on a thorough, historical analysis of the development of the present statutory language and its past interpretations. This analysis entailed a review of a wide variety of legislative and administrative materials, predating the presently effec-

tive Postal Reorganization Act of 1970, which the parties had marshalled in support of their positions. This material included the relevant provisions of every postal statute from the Act of 1710, which established the postal monopoly in the colonial period through the 1872 codification of the postal laws which established the modern definition of the monopoly ("letters and packets"); the provisions of amendments to the postal statutes enacted after 1872; and legislative reports, Post Office Department regulations, opinions of solicitors of the Post Office Department; and Postal Service publications issued during the 19th and 20th centuries.*

The Court's decision reflects its careful evaluation of the historical

*A list of the historical materials cited to the Court of Appeals is set forth in Appendix A.

evidence. It found that the postal statutes prior to 1872 clearly encompassed addressed advertising circulars, that the 1872 revision represented only an attempt to codify those prior laws, without substantive alteration, and that no evidence exists that the 1872 Congress deliberately intended to contract the scope of the monopoly. Accordingly, the Court found that "the legislative text and history...tends to favor the Postal Service." (Appendix A to Petition, p. 7a). The Court also examined the pronouncements of Postal Solicitors and publications since the 1872 codification and concluded that the administrative history of the Private Express Statutes does not furnish a basis for holding them inapplicable to advertising circulars. (Id. p. 11 a).

In its present petition ATCMU does not challenge the accuracy of the

Court's assessment of the historical evidence. Instead, it merely reiterates its contention that to treat advertising circulars as "letters" is contrary to common usage since advertisements contain public rather than private messages. The Court of Appeals rightly held this contention unpersuasive where advertisements are specifically addressed to persons or locations. It noted that the specificity of an addressee is a common sense indicium of "letterness" and that the messages contained in addressed advertisements are primarily intended for the recipient, who has been identified as most likely to be interested in the advertised product.

The Court of Appeals' reasoning is directly supported by the pre-existing case law, United States v. Bromley, 53 U.S. (12 How.) 87 (1851) [holding unsealed, commercial orders letters within

the postal monopoly]; National Association of Letter Carriers v. Independent Postal System of America, 336 F.Supp. 804 (W.D. Okla. 1971), aff'd 470 F.2d 265 (10th Cir. 1972) [holding Christmas cards from business or commercial concerns, containing no personal message and intended for mass delivery, to be letters when addressed to a particular person]; as well as by standard dictionary definitions of "letter", see, e.g. Webster's New International Dictionary, Second Edition, Unabridged, 1961; The Random House Dictionary of the English Language (New York 1973), Funk & Wagnall's Standard College Dictionary (New York 1968).

ATCMU cites no conflicting case law and relies entirely on the hypothetical dialogue of "the Joneses" to set the limits of the postal monopoly. In light of the clear absence of any statutory, judicial,

or legislative authority supporting ATCMU's position, the well reasoned decision of the Court of Appeals should be permitted to stand and the petition for review should be denied.

II. Petitioner's Constitutional Claims Are Frivolous

The Courts have long upheld the constitutionality of the Private Express Statutes as an appropriate exercise of Congressional power. See, Ex Parte Jackson, 96 U.S. 877 (1877); United States Postal Service v. Brennan, 574 F.2d 712 (2d Cir. 1978), cert. den. 58 L.Ed. 2d 51 (1979); United States v. Black, 418 F.Supp. 378 (D. Kan. 1976) aff'd 569 F.2d 1111 (10th Cir.) cert. den. 435 U.S. 944 (1978). Petitioner does not challenge this basic concept.

ATCMU does claim that the distinctions drawn by the Postal Service

regulations between addressed advertisements, on the one hand, and unaddressed advertisements, newspapers, and catalogues, on the other, are so arbitrary and irrational as to violate the due process and equal protection guarantees of the Fifth Amendment. But this contention is wholly specious. As the Second Circuit recently observed in rejecting an identical equal protection challenge to the Private Express laws, "the classification is not directed against persons; rather it is based upon types of mail.... Obviously the distinction between types of mail is not invidious." United States Postal Service v. Brennan, supra, 574 F.2d at 717. ATCMU members are in no different position than any other advertisers who wish to arrange for delivery of paper circulars. Since the Postal Service regulations do not accord differential treatment to persons similarly situated, they cannot be challenged on

equal protection grounds.* Reed v. Reed, 404 U.S. 71 (1971).

Petitioner's First Amendment claim is equally baseless. The Postal regulations do not prevent distribution of its members advertisements. ATCMU members are free to utilize the mails or any of the other methods recognized by the Statutes. Given these alternative delivery methods, petitioner cannot possibly demonstrate a denial of its members' freedom of speech. See Rockville Reminder, Inc. v. United States Postal Service, 480 F.2d 4, 7-8 (2d Cir. 1973); United States

*Moreover, the distinction between addressed and unaddressed advertising is hardly so irrational as to raise a due process issue. That distinction simply reflects the Postal Service's need for a clear-cut, administrable test for "letterness" which is consistent with the text and history of the Private Express Laws. Indeed, petitioner's suggestion that letters be distinguished from non-letters on the basis of the privacy of their contents (Petition, p. 7) would seem to raise far graver risks of constitutional infirmity.

v. Black, supra, 418 F.Supp. at 382; see also, Council of Greenburgh Civic Associations v. USPS, 586 F.2d 936, 938-9 (2d Cir. 1978) (Kaufman, J. concurring). Moreover, the restrictions imposed on delivery of addressed advertisements are the same restrictions imposed on all other types of mail subject to the postal monopoly. Petitioner's First Amendment theory is thus utterly irreconcilable with the established constitutionality of the Private Express Statutes.

III. The Issues Raised Herein Do Not Merit Review by this Court

Petitioner seeks to attribute national significance to its claims by citing allegedly inflated increases in postal rates for bulk third class mail, the Postal Service's so-called "power grabbing", and the imagined impact of the lower Court's ruling on "the raging controversy over whether the postal monopoly applies to 'electronic mail'". The electronic mail question -- which arises from

proposed Postal regulations -- is utterly irrelevant to the issues which have been litigated here. Petitioner's complaint did not allege -- nor has it since claimed -- that its members seek to utilize electronic communications subject to postal regulation. In any event, as the Second Circuit observed in the Brennan case, the various considerations of economic and postal policy cited by petitioner are "a matter for the Congress and not the courts." 574 F.2d at 717.*

*The scope of the Private Express Statutes is a matter of continuing congressional concern. For example, the Subcommittee on Postal Operations and Services of the House of Representatives Post Office and Civil Service Committee is presently conducting oversight hearings on the Private Express Statutes. See Federal Times, p. 1, May 14, 1979. At least two bills are presently pending in the House which would create exceptions to the Statutes for so-called "time-sensitive" mail. H.R. 3669 and H.R. 4082. Moreover, President Carter is expected in the immediate future to issue a policy memorandum defining the Postal Service's role in the electronic communications field. Telecommunications Reports Vol. 45, No. 23 June 11, 1979, p. 8.

The only substantial dispute raised in this case is over the construction of the statute -- i.e. whether specifically addressed advertising materials are letters within the Private Express Statutes. This narrow, sui generis issue has now been conclusively resolved by the Postal Service, the District Court and the Court of Appeals and does not merit further review. Surely it would serve no useful purpose for this Court to replicate the Court of Appeals' exegesis of centuries-old documents -- merely to affirm the obvious correctness of its historical conclusions. Accordingly, the writ should be denied.

CONCLUSION

The petition for a writ of
certiorari should be denied.

Dated: July 2, 1979

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APPENDIX

APPENDIX A

HISTORICAL MATERIALS
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§2 (1710)

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23 Journ. Cont. Cong. 672-3

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Ch. 16, 1 Stat. 70

Act of March 3, 1791, Ch. 23,
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Act of Feb. 20, 1792, Ch. 7,
§§5, 14, 16, 17, 22, 1 Stat.
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§6, 1 Stat. 509

Act of March 2, 1799, Ch. 43,
§§3, 14, 15, 20, 1 Stat. 733

Act of April 30, 1810, Ch. 37,
§§7, 18, 19, 20, 21, 27, 2 Stat.
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§§9, 19, 21, 22, 23, 24, 30,
4 Stat. 102

Act of March 2, 1827, Ch. 61, §3,
4 Stat. 238

Act of March 3, 1845, Ch. 43, §§1,
2, 3, 9, 10, 15, 5 Stat. 732

Act of August 31, 1852, Ch. 113,
§8, 10 Stat. 121

Act of March 3, 1863, Ch. 71,
§§19, 20, 31, 12 Stat. 701

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131, 132, 133, 134, 146, 147,
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163, 164, 170, 190, 196, 228,
239, 240, 17 Stat. 283

Revised Statutes, Title 46,
Chs. 3-4 (1874)

Act of March 3, 1879, Ch. 180,
§§7-23, 20 Stat. 355

Act of March 4, 1909, 35 Stat. 1123

Act of June 30, 1926, 44 Stat.
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Act of June 25, 1948, 62 Stat.,
at 776-7

Act of Sept. 2, 1960, 74 Stat.
at 586

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3 Annals of Congress, 356, 2d
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14 Congressional Globe, 195-96
(1845)

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Revise the Statutes of the
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No. 31, 40th Cong., 3d Sess.
2 (1869)

Report of the Committee Appoin-
ted by the Postmaster General
to Examine and Revise the
Postal Code, March 30, 1870

Cong. Globe, 41st Cong. 3d
Sess. 30-37, 41-47, 83-86
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06 (1872)

H.R. Rep. No. 164, 46th Cong.,
2nd Sess. (1880)

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1879 edition: §§215, 217, 219,
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1887 edition: §§325, 359, 360,
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42 (1955)

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